IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

WEDNESDAY, THE 20TH DECEMBER 2006 / 29TH AGRAHAYANA 1928

C.E.APPEAL No. 20 OF 2004()

FINAL ORDER NO. 667/03 NB(A) DATED 8.12.2003 IN APPEAL E/342/2001/NB(A) ON THE FILE OF THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, RECEIVED ON 12.1.2004.)

APPELLANT/RESPONDENT

COMMISSIONER OF CENTRAL EXCISE
COCHIN COMMISSIONERATE, C.R.BUILDING,
I.S.PRESS ROAD, COCHIN-682018.

BY ADV. SRI.S.KRISHNAMOORTHY, ADDL.CGSC

RESPONDENTS: APPELLANT

M/S. TATA TEA LIMITED, INSTANT TEA
DIVISION, MUNNAR 685 612.

BY ADV. SRI.JOSEPH KODIANTHARA
SRI.MITHUN MARKOS

THIS CENTRAL EXCISE APPEAL HAVING BEEN FINALLY HEARD ON 17/11/2006, THE COURT ON 20.12.2006, PASSED THE FOLLOWING:

P.R. RAMAN & K.P. BALACHANDRAN, JJ.

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C.E. APPEAL 20/2004

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DATED THIS, THE 20TH DAY OF DECEMBER, 2006.

J U D G M E N T

Raman, J.

The Commissioner, Central Excise, Cochin, is the appellant herein. The respondent M/s. Tata Tea Limited, Instant Tea Division, Munnar (hereinafter referred to as 'the assessee') is a 100% Export Oriented Undertaking (EOU) who manufactures and exports 'Instant Tea' falling under Chapter Sub-heading No. 2101.20. Being a 100% EOU, the assessee has been procuring excisable goods without payment of duty under a bond executed with the Assistant Commissioner of Central Excise, Muvattupuzha Division in Form B-17 to comply with the conditions stipulated in Notification No. 1/95-CE dated 4.1.1995, as amended. The assessee brought in 'Furnace Oil' also without payment of duty, which is used as fuel in boilers generating steam for various purposes in the unit. The authorities took the view that as per Notification No. 1/95-CE dated 4.1.1995, fuel used for captive power plants and captive generating sets

only are exempted from Central Excise Duty when brought in connection with the manufacture of articles into a 100% EOU. In the application for renewal of concession granted for procuring goods, dated 24.2.1994 addressed to the Department, the assessee has declared, as required under rule 192, that furnace oil is used as fuel in the manufacture of 'instant tea'. It was the case of the Department that in order to avail exemption under Notification 1/95 CE, the assessee has suppressed the fact that they are actually using 'furnace oil' in boilers. Placing reliance on Entry No. 3C to annexure to Notification (No. 31/98 dated 15.9.1998) the assessing officer held that the condition for availing exemption is that furnace oil procured is to be specifically used in boiler used in a textile unit. On that premise, it was held that for the period from 1.1.1996 to 31.3.2000, the assessee has violated the provisions of Rule 192 of Central Excise Rules and Notification No. 1/95 CE dated 4.1.1995 as amended in as much as they have procured furnace oil required in their boilers for producing steam valued at Rs. 7,33,16,546/- suppressing the fact that the oil was so used, by merely mentioning in their application that furnace oil procured is used as fuel in the manufacture of instant tea. According to the assessing officer, because of this, the first proviso to Section 11A(1) of the Central Excise Act is attracted. A show cause notice was issued accordingly, directing the

assessee to show cause to the Commissioner of Central Excise, as to why an amount of Rs. 89,47,549/- and Rs. 5,63,030/- being the Central Excise Duty payable on furnace oil procured under Rule 192 during the period 1.1.1996 to 31.3.2000 and 1.4.2000 to 21.5.2000 respectively should not be demanded from them under Rule 196 of Central Excise Rules and first proviso to Section 11A(1) of the Central Excise Act, 1944. The assessee was also directed to show cause as to why a penalty equal to the duty determined should not be imposed on them under Section 11 A.C. of the said Act and why separate penalty should not be imposed under Rules 173Q, 210 and 226 of the Central Excise Rules as also interest at the rate applicable under Section 11 AB of the Act. They were further asked to show cause why the land, building, machinery etc. used in the manufacture should not be confiscated under Rule 173 Q of the Central Excise Rules.

2. The assessee replied inter alia contending that the proposal is bad in law and is unjustified, unreasonable and against the scope and intent to conferment of benefits or exemptions to 100% EOUs and are otherwise based on totally erroneous presumptions and inferences. They further contended that the notice is barred by limitation and none of the ingredients of Section 11 A is present so as to invoke the extended period, that in application dated 27.2.1992 they had clearly specified their requirements

of inputs for manufacture including furnace oil which was duly sanctioned., that further legal undertaking executed with the Development Commissioner of EOUs dated 26.6.97 was filed with the Deputy Commissioner of Central Excise and a bond was executed including furnace oil as an input, that one of the consumables used by them for the manufacture of instant tea is furnace oil which is used as fuel in boilers for generating steam which is further used in the process of manufacture of instant tea and the same was clearly specified in the agreement as a consumable; that furnace oil is both imported from abroad as well as manufactured within India by oil companies and supplied to the Unit, that with respect to furnace oil procured within India the Unit was permitted to procure the same without payment of Central Excise Duty to the oil companies, that after approval as a 100% EOU, the unit started procuring furnace oil without payment of Central Excise duty under the provisions of Notification No. 123/81 dated 2.6.1981, that the Department had specifically examined the use of furnace oil in the manufacture of Instant Tea in 1993 and concluded that CT 3 form can be issued for furnace oil procurement free of excise duty which is evident from the letter O.C. No. 553/93 dated 15.12.1993 obtained from the then Superintendent of Central Excise, that they had also furnished a write up to the Department on

6.6.1994 detailing the use of furnace oil in boiler for generating steam for manufacture and it was clearly specified therein that steam generated was used for drying instant tea from liquid to powder form which is an integral part of manufacture, that as directed by the Development Commissioner in his letter dated 8.12.1994 they had approached the Jurisdictional Assistant Commissioner for permission to procure capital goods, raw materials and consumables and by letter dated 24.2.1994 explained the manner in which such goods were to be used and stated that furnace oil was used as fuel in the manufacture of instant tea, that when Notification No. 123/81 was superseded by Notification 57/94 dated 1.3.1994 the assessee by letter dated 27.4.1994 addressed to the Assistant Commissioner, detailed the various materials required to be purchased free of duty under Notification 57/94 dated 1.3.1994, that in response to the letter of Range Superintendent asking as to which are the categories of the table annexed to Notification 57/94 under which each item of the list was to be included the assessee replied by letter dated 12.8.1994 that furnace oil was a consumable required for the "manufacture of goods" coming under Sl. No.5 of Notification 57/1994 and subsequently approval was granted by the Assistant Commissioner and the Unit was permitted to procure furnace oil and other materials free of duty following the procedure under Notification No. 57/94

which was superseded by Notification 1/95 dated 4.1.1995 and under the terms of the said notification also the Unit continued to receive raw materials and consumables including furnace oil free of duty for the calendar years 1995 to 2000, after notifying the Assistant Commissioner and Superintendent and on receipt of their approval, that all the consignments were duly re warehoused under the supervision of Central Excise Officers as per Central Excise Rules, that as per the amendment brought in Notification No. 1/95 vide Notification No. 31/98 CE dated 15.9.1998 item 3C specified "furnace oil required for boilers used in textile units" as one of the eligible items which could be brought into a 100% EOU free of duty, that the said amendment was made with the intention of regulating and controlling furnace oil supplies to textile units and not for denying duty free purchase of furnace oil for use as a consumable by other 100% EOUs which were not textile units, that subsequently, based on representations made by the Export Oriented Units to the Ministry of Commerce, the Government, as per Notification No. 40/2000 dated 22.5.2000 made an amendment in Notification No. 1/95 CE deleting the words "used in textile units" from item 3C and since the amendment was issued pursuant to the representation, it is retrospective in operation. They have also placed reliance on the decision of the CEGAT, New Delhi in the

case of **CCE vs. Kudremukh Iron ore Company Ltd.** (1988 (36) ELT 626 to contend that High Speed Diesel Oil is eligible for exemption as a consumable. They highlighted the fact that admittedly, furnace oil was eligible for exemption under Notification No. 57/94 as a consumable and by no stretch of imagination can it cease to be so entitled to exemption as a consumable under Notification No. 1/95.

3. After affording a personal hearing, the Commissioner of Excise passed an order dated 30.8.2001 confirming an amount of Rs. 18,73,911/- as duty payable by the assessee under Section 11 A(2) of Central Excise Act in respect of Furnace oil procured during 1.1.2000 to 21.5.2000 as per the list annexed to the show cause notice. However he refrained from imposing any penalty. He also held that there is no ground for invoking the extended period for raising the demand under the provisions of Rule 196 of the Central Excise Rules, since the unit has fully accounted for the goods procured in accordance with the declaration given in their application. He also held that the demand raised beyond a period of one year is time barred and the extended period of limitation under Section 11A is not applicable. But on the basis of the finding that furnace oil cannot be treated as a consumable as far as Notification 1/95 is concerned, he sustained the demand for the period from 1.1.2000 to 21.5.2000 and

confirmed the proposal demanding an amount of Rs. 18,73,911/- as stated above.

4. The assessee appealed to the Central Excise & Service Tax Appellate Tribunal,, which, by its order dated 8.12.2003, set aside the order of the Commissioner of Central Excise and allowed the appeal. The Tribunal entered a finding that the assessee had, after complying with Rule 192 of the Central Excise Rules, procured Furnace Oil from Indian market without payment of duty under bond executed with the jurisdictional Assistant Commissioner in terms of Notification No. 1/95 (as amended) and used the same as fuel for boilers which generated steam which was in turn used for the manufacture of Instant Tea Powder. The process of manufacture of Instant tea powder was referred to by the counsel appearing for the assessee before the Tribunal and submitted that furnace oil used as fuel in boilers for generating steam was squarely covered by the entry 'consumables' in Annexure -I to the notification and the same has to be liberally construed so as to give full effect to the EOU scheme. In support thereof, reliance was also placed on the decision in Collector of Central Excise Vs. Kudremukh Iron Ore Co. Ltd. (1988 (36) ELT 626)., Waterbase Ltd. v. CC. Guntur (2001 (130) E.L.T. 386), Johnson & Johnson Ltd. Vs. CCE, Aurangabad (1997 (92) E.L.T. 641 (SC), Novopan India Ltd. Vs.

CCE, Hyderabad (1994 (73) ELT 769 (SC) and Mangalore Chemicals & Fertilizers Ltd.. v. Dy. Commissioner (1991 (55) ELT 437 (SC)). The tribunal held that furnace oil brought into EOU and used in boilers during 1.1.2000 to 21.5.2000 was exempted from payment of Central Excise duty in terms of Entry No.7 of Annexure 1 to Notification No. 1/95-C.E. dated 4.1.95. After referring to the decision of the Supreme Court in the case of **Belapur Sugar & Allied Industries Ltd. (1999 (108) ELT 9 SC)** wherein it was held that 'unless there is anything to the contrary in the taxing statute, rules or the notification itself, if there be two possible interpretations of an Exemption Notification, that interpretation which sub-serve the object and purpose of exemption should be accepted', it was held that in the instant case nobody has a case that 'consumable' could be so construed as to exclude fuels like furnace oil used in boilers. According to the tribunal, the assessee had admittedly satisfied all the substantive conditions of Notification No. 1/95-CE to come within its purview and the only dispute is whether furnace oil fell within the coverage of 'consumables' under Entry 7. Relying on the apex court ruling, it was held that the entry is squarely applicable to the assesssee's case. Accordingly, the order of the Commissioner of Excise was set aside to the extent it relates to the demand of duty for the period from 1.1.2000 to 21.5.2000 and the appeal was

allowed. It is challenging the said order passed by the appellate authority, that the present appeal is preferred by the Commissioner of Central Excise. Cochin.

5. It is an admitted fact that in the present case the assessee is a 100% Export Oriented Unit and that it complied with all procedural requirements for availing the benefit of exemption. The assessee had specified in their application dated 27.2.1992 the requirements of inputs for manufacture including furnace oil, which was duly sanctioned. They have also executed an undertaking with the Development Commissioner of EOUs which was duly filed with the Deputy Commissioner of Central Excise. A bond was also executed including furnace oil as an input. The fact that furnace oil is used as fuel in boilers for generating steam to be used in the process of manufacture of instant tea was clearly specified in the agreement as a consumable. They started procuring furnace oil by availing exemption as per Notification No. 123/81 dated 2.6.1981 and use of furnace oil as such in the manufacture of instant tea is beyond dispute. But the question that arises for consideration is as to whether the assessee is actually entitled for the benefit of the notification to avail duty exemption. The various facts as narrated by the assessee to substantiate their case that they had complied with the legal formalities as required before availing

duty concession may show that there is no suppression of any factual aspects by the assessee and therefore, relying on those circumstances, even the assessing authority has found that the extended period of limitation cannot be invoked in the case of the assessee. But for the subsequent period, after 31.12.1999, the question as to whether the assessee is entitled to the benefit of exemption from payment of customs duty on furnace oil imported by them and whether they are entitled for such exemption from payment of Central Excise duty on the items indigenously procured, arises for consideration.

6. According to the appellant, furnace oil is a 'consumable' under Item 7 of Annexure I of Notification No. 1/95CE dated 4.1.1995 as amended from time to time. But the adjudicating officer did not accept this contention. Serial Nos. 3 and 7 of the Annexure to the relevant notification for the period from 4.1.1995 to 14.9.1998 reads as under:

> "3. Captive power plants, including captive generating sets and their spares, fuel, lubricants and other consumables for such plants and generating sets as recommended by the said Board or the said Committee, as the case may be.
> xx x x x x x xx xxxxxxx xxxxxxx
>
> 7. Consumables."

7. Subsequently, Notification No. 31/98 CE dated 15.9.1998 was

issued substituting four separate entries. namely, Entry "3C" was substituted with certain other entries. The entry "3C" in the subsequent notification reads as follows:

> "3C. Furnace oil required for the boilers used in the textile units as approved by the Commissioner of Customs on the recommendation of the Development Commissioner."

So however, entry No. 7 "Consumable" continued as before without any change. Subsequently, Notification No. 40/2000 CE dated 22.5. 2000 was issued whereby Entry 3C was altered but again Entry No. 7 was left in tact. Entry 3C as substituted by the above notification reads as hereunder:

> '3C. Furnace oil required for the boilers as approved by the Assistant Commissioner of Cstoms or Central Excise on the recommendation of the Development Commissioner."

8. The adjudicating authority, entered a finding as follows:

> "Furnace oil is no doubt a fuel but there is a separate entry for exemption of fuel used for captive power plants including captive generating sets in the same notification. In other words a conscious distinction between fuel and consumables has been made in Notification 1/95. Therefore, extending the benefit of exemption for furnace oil as consumable under Notification 1/95 to M/s. Tata Tea Ltd., is ab-initio wrong. For the first time furnace oil used in boiler for textile unit was included in Notification No. 1/95 by an

> amendment Notification 31/98 dated 15.9.1998. Later on 22.5.2000 the words "used in textile units" were deleted and for the first time furnace oil for all EOUs was exempted with effect from 22nd May, 2000 in view of the amending notification 40/2000. This notification does not have any retrospective effect. In this context it is observed that an amendment was carried out in the notification 1/95 on 15.9.1998. After issue of Notification 40/2000, GOI issued Circular No. 49/2000 Cus. dated 22.5.2000 and para 23 of the circular reads as follows: "Notification Nos. 133/94-Cus dated 22.8.1994, 53/97-Cus dated 3.8.97 and 1/95-CE dated 4.1.95 provide for duty free import/procurement of furnace oil for boiler in textile units only. The Ministry of Commerce has requested that the boiler is required for units other than textiles also. It has also been pointed out that Notification No. 126/94-CE dated 2.9.94 does not allow duty free procurement of furnace oil even for the textile unit. The matter has been considered and notification Nos. 133/94-Cus dated 22.6.1994, 53/97-Cus dated 3.8.97, 1/95-CE dated 4.1.95 and 126/94 CE dated 2.9.94 have been amended to allow duty free import/procurement of furnace oil for boilers in all EOU/EPZ units." In view of the above circular, it is abundantly clear that the duty free procurement of indigenous furnace oil for EOU was not having the sanctity of the law till 21.5.2000."

9. Thus according to the adjudicating authority, Entry No. 3 in Notification relating to captive power plants specifically includes fuel, lubricants and other consumables. Therefore, while interpreting Entry 7 "Consumables" those entries relating to "Fuel, lubricants etc." should stand

excluded while interpreting the true manner of the term "Consumables" under Entry 7. If "Consumables" was intended to take in fuel also there was no necessity to specifically include the same in Entry 3. It is only to strengthen the said argument that the subsequent amendment was brought out by introducing 3C at the first instance by Notification No. 31/98 and the subsequent amendment brought out by Notification No. 40/2000 was referred to.

10. The tribunal observed that the adjudicating authority appears to have taken the view that there being a separate entry for "furnace oil for boilers", the entry "consumables" could not be invoked to claim duty-free procurement of furnace oil into a 100% EOU for the relevant period. The tribunal did not accept this contention as according to it, in as much as each entry in the Annexure is per se specific and requires to be construed independently, untrammeled by anything contained in any other entry and once it falls under Entry 7 as "consumable", there is no reason to hold that the said entry should be given a restricted meaning because of the amendment subsequently made by inserting 3C and thereafter amending the same by later notification No. 40/2000. The correctness of the view expressed by the Tribunal therefore arises for consideration.

11. As we have already noticed, the Department was all along taking

the view that furnace oil, which is an input used as a fuel in the boilers for the ultimate manufacture of Instant tea, is liable to be exempted. This view has however, taken a sudden change because of the introduction of Entry 3C by Notification No. 31/98 as noticed above. If as a matter of fact, while issuing the notification, it was the intention of the authorities to give a restricted meaning to the word "Consumable" contained in Entry 7, suitable amendment would have been made to that Entry simultaneously while introducing Entry "3C" as per notification No. 31/98. Since Entry "3C" provided for exemption of furnace oil required for boilers used in textile units alone on certain conditions, various Export Oriented Units represented before the Government, as a result of which Entry "3C" itself was amended by Notification No. 40/2000 clarifying the position that furnace oil required for boilers are liable to be exempted irrespective of the unit whether it is a textile unit or not. That however, will not belittle the contention of the appellant that even otherwise it would fall under Entry 7 as a "Consumable". It is a fact that the appellant is a 100% Export Oriented Unit and have been following the procedure as contemplated by Notification before availing exemption. Therefore, the basic requirement for availing exemption were satisfied by the appellant and if at all there were two views possible as to whether it would fall under Entry 7 as

"Consumable" or under 3C only, the word "consumable" being of a wide import and in the absence of any restrictive terms employed while describing Entry 7, the benefit of doubt, if any should go in favour of the assessee. In the instant case, it was found by the tribunal that nobody has a case that furnace oil was brought into the appellant's Export Oriented Unit not for manufacture of instant tea powder. Further, as held by the apex court in Johnson & Johnson's case, the legislative intention behind the notification could be gathered from the subsequent notification in the same subject. In the decision in **Sun Export Corporation Vs. CC, Bombay** (1997 (93) ELT 641 (SC)) the apex court held that where two views are possible in a taxation matter, the one favourable to the assessee should be preferred. In the case of **Belapur Sugar & Allied Industries** (supra) it was held by the apex court that unless there is anything to the contrary in the taxing statute, rules or notification itself, if there are two possible interpretations of an Exemption Notification that interpretation which subserves the object and purpose of exemption should be accepted.

12. In view of the above decisions of the apex court, there admits of no doubt that the appellant, who has satisfied all the conditions stipulated for getting the benefit of exemption being a 100% EOU and the furnace oil

being a consumable falling under Entry 7 of Annexure I to the notification relevant in issue, the contention that by the subsequent insertion of Entry '3C' by Notification No. 31/98 and the amendment thereafter by Notification No. 40/2000-CE cannot be taken as a guideline to interpret Entry 7 so as to give a restrictive meaning thereto. The view expressed by the Tribunal is thus correct in law. In the circumstances, we find no merits in the appeal.

In the result, upholding the view taken by the Tribunal, we dismiss the appeal.

P.R. RAMAN,
(JUDGE)

K.P. BALACHANDRAN,
(JUDGE)

knc/-